Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEILA JEANNE HILL, *et al.*, *Petitioners*,

v.

THE STATE OF COLORADO,
ROY ROMER, GOVERNOR, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Colorado

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under a new Colorado criminal law, no one may distribute leaflets, orally counsel, educate or protest, or display signs, within eight feet of another person, while the speaker is within one hundred feet of the entrance to a medical facility, unless the speaker first seeks and gets consent from the other person. C.R.S. § 18-9-122(3). Either the failure to seek consent or the denial of consent make communication within eight feet of someone else a crime under Colorado's "Bubble Zone" law. The following questions are presented:

1. Is a statutory obligation to obtain consent before exercising constitutionally-protected expressive rights in a traditional public forum inconsistent with this Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516 (1994), striking down an injunctive "consent to speak" requirement?

2. Does C.R.S. § 18-9-122(3) violate petitioners' First and Fourteenth Amendment rights to freedom of speech, press and assembly?

3. Does C.R.S. § 18-9-122(3) violate petitioners' Fourteenth Amendment rights to equal protection of the law?

PARTIES

The following persons were appellants in the proceedings below and are petitioners in this Court:

> Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.

The following persons or entities were appellees in the proceedings below and are respondents in this Court:

> The State of Colorado, Roy Romer, Governor; David J. Thomas, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; The City of Lakewood, Colorado; and, Gale Norton, in Her Official Capacity as Attorney General of the State of Colorado.

None of the petitioners is a corporation. *See* Rule 29.6.

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In The
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LEILA JEANNE HILL, *et al.*

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Petition for Writ of Certiorari to the Court of Appeals of the State of Colorado

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Colorado Court of Appeals is reported as *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995). App. 1a. The Order denying the Petition for Rehearing is unpublished. App. 20a. The Order of the Colorado Supreme Court denying the Petition for a Writ of Certiorari to the Colorado Court of Appeals is unpublished. App. 19a. The judgment of the trial court is unpublished. App. 10a.

JURISDICTION

The Colorado Court of Appeals issued its opinion affirming the judgment of the trial court on July 13, 1995, and issued its order denying the petition for rehearing on August 17, 1995. The Colorado Sureme Court denied the

petition for a writ of certiorari on February 26, 1996. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL and STATUTORY PROVISIONS

The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Section one of the fourteenth amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

C.R.S. 18-9-122 states, in pertinent part:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be

balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowlingly obstructing another person's entry to or exit from a health care facility.

* * *

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

* * *

STATEMENT OF THE CASE

The Colorado Court of Appeals upheld the constitutionality of Colorado Revised Statutes § 18-9-122(3), a new statute making it a criminal offense in Colorado to distribute literature, display picket signs, or orally protest, counsel or educate, under the circumstances contemplated in

the statute. This the appeals court did even while acknowledging that the statute directly restricted speech in traditional public forum properties (sidewalks and streets). C.R.S. § 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health care facility who, without first obtaining permission to do so and while within eight feet of another person, passes a leaflet to, displays a sign to, or directs oral protests, counselling or education to that other person. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995). This statutory provision is functionally similar to the "consent to speak" provision struck down by this Court in *Madsen v. Women's Health Center, Inc.* 512 U.S. ___, 114 S. Ct. 2516 (1994).

A. *Statement of Facts Material To Consideration of the Questions Presented.*

Petitioners are "sidewalk counselors" – they offer abortion-bound women alternatives to abortion. R. 4, 112-14, 148-49, 151-53.[1] They inform passersby about abortion and abortion alternatives orally, by sign displays, and by leafletting. R. 4, 112-14, 148-49, 151-53. They make cards, leaflets, and pamphlets, R. 4, 112-14, 148-49, 151-53, and distribute them near businesses where abortions are performed. R. 4, 112-14, 148-49, 151-53. They make posters about abortion to display in public. R. 4, 112-14, 148-49, 151-53. Some posters bear words, others pictures. Petitioners have counseled or protested in various places around Colorado. R. 113, 149, 151-52.

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1. References herein are made to the record transmitted from the Jefferson County District Court to the Colorado Court of Appeals. Those references are indicated as "R.__."

On April 19, 1993, C.R.S. § 18-9-122(3), became effective.[2] Pursuant to C.R.S. § 18-9-122(3), whenever a person is within 100 feet of the entrance door to a medical facility, that person must seek and get consent from any other person before approaching within eight feet of that person to hand a leaflet, display a sign, or engage in oral education, counselling or protest. Failure to seek consent before speaking, displaying signs, or leafletting is a misdemeanor criminal offense, *id.*, as are speaking, displaying signs, or leafletting when consent has been denied, *id.*

Officials of the City of Lakewood knew of the enactment of C.R.S. § 18-9-122(3). The City, its legal counsel, and its law enforcement personnel planned and threatened to enforce the provisions of the statute. R. 4, 32, 42, 270. Legal counsel for the Lakewood Police prepared a guidance memorandum on enforcement of C.R.S. § 18-9-122(3). R. 270.

Before enactment of C.R.S. § 18-9-122(3), Petitioners regularly voiced their views on human abortion on public sidewalks and ways within 100 feet of the entrance doors to abortion facilities. R. 4, 112-14, 148-49, 151-53. They advised women near abortion businesses about alternatives to abortion. Before C.R.S. § 18-9-122(3), they spoke without fear of censorship, R. 4, 112-14, 148-49, 151-53, or prosecution, R. 4, 112-14, 148-49, 151-53.

When C.R.S. § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Petitioner Simpson completely discontinued his activities on public property within 100 feet of abortion facility entrances. R. 153. Petitioners Hill and Himmelmann changed the ways

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2. The text of the Act is set out in the Petition at 2-3.

in which they carry out their activities. R. 114, 149. These changes have made their counseling, education and protest efforts risky, difficult, and less effective. Petitioners have found it impossible, at times, to remain on the sidewalk, and keep at least eight feet away from others in order to continue speaking, displaying signs or otherwise protesting or counseling. R. 113, 149, 153. Petitioners want to resume their former activities but fear prosecution should they do so. R. 114, 150, 154.

B. *Statement on Preservation of Federal Questions in Trial Court and the Colorado Court of Appeals*

From the outset of this litigation, the federal questions presented in this Petition have been the central focus of the dispute between the parties and the principal grounds of the decisions below.

Petitioners filed a Verified Complaint in the District Court of Jefferson County, Colorado. Therein, Petitioners asserted that C.R.S. § 18-9-122(3) violated several federal constitutional rights. In the Complaint, Petitioners alleged that C.R.S. § 18-9-122(3) violated: the right to freedom of speech under the United States Constitution (Fifth Cause of Action); the right to freedom of the press under the United States Constitution (Sixth Cause of Action); the right to peaceably assemble under the United States Constitution (Seventh Cause of Action); the right to due process under the United States Constitution (Eighth Cause of Action); and, the right to the equal protection of the laws under the United

States Constitution (Ninth Cause of Action).[3] *See* Verified Complaint ¶¶ 1, 5(b), 5(d), 56-64, 65-68, 69-73, 74-77, 78-79, *Hill v. Thomas*, No. 93CV1984 (Jefferson County District Court, Colo.).

The Questions Presented in this Petition are fully preserved for review by this Court.

1. The trial court's treatment of the federal questions.

In an Order dated April 22, 1994, the trial court granted summary judgment for the Respondents. App. 10a-18a. Explaining the nature of the matter, the trial court stated:

> The Plaintiff's [sic] challenge C.R.S. Section 18-9-122 as (1) a violation of freedom of speech under the United States Constitution; (2) a violation of the freedom of press under the United States Constitution; (3) a violation of right of peaceable assembly under the United States Constitution; (4) a violation of the due process clause of the United States Constitution; (5) a violation of the equal protection clause of the United States Constitution; and violative of applicable provisions of the Colorado State Constitution.

App. at 11a. After identifying Petitioners' suit as a facial challenge to the constitutionality of C.R.S. § 18-9-122(3), the trial court noted,

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3. Consistent with their claims that C.R.S. § 18-9-122(3) violated their federal constitutional rights, Petitioners requested a declaration that the Colorado Bubble Zone Statute violated those federal constitutional rights. *See* Prayer for Relief ¶ (a) in the Verified Complaint. *Hill v. Thomas*, No. 93CV1984 (Jefferson County Dist. Ct. Oct. 1, 1993).

> *It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment.* The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution.

App. at 11a-12a (emphasis added).

Proceeding to the question "whether the statute reasonably regulates" activities protected by the First Amendment, the trial court considered the operative context of the statute. Of Petitioners' expressive activities, the trial court held, "[t]here is no question that the Plaintiff's conduct implicates First Amendment rights." App. at 12a. Further, the court held, "[t]he public sidewalks and streets, including the ones that the statute would apply, [sic] constitute 'quintessential' public forum [sic] for First Amendment purposes." App. at 12a (discussing *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)).

Having found that protected activities were implicated by a statute that operated in traditional public forum properties, the trial court addressed the specific defects alleged by the Petitioners.

Petitioners alleged that C.R.S. § 18-9-122(3) regulated speech according to its content and or viewpoint. The trial court rejected Petitioners' argument. The court concluded that, because C.R.S. § 18-9-122(3) "applies not only to oral protest but to 'education' and 'counseling[,]'" the statute "applies to all viewpoints, rather then [sic] only certain viewpoints." App. at 13a. The trial court reasoned that the "statute in question applies even-handedly to all speakers and the content of their speech." *Id.* The court also found significant that "[a]ll persons demonstrating are to comply

with the statute." *Id.* Thus, in the court's judgment, the "statute does not govern the subject matter of the message." *Id.*

Petitioners had argued that C.R.S. § 18-9-122(3) was not narrowly tailored. The trial court disagreed. In the trial court's view, the statute "targets the offensive and disturbing conduct taking place outside health care facilities[,]" and "[i]t address[es] the exact source of evil it seeks to remedy." App. at 14a.

Petitioners had argued that C.R.S. § 18-9-122(3) did not leave open ample alternative channels of communication. The trial court held that it did. The court concluded that because the statute only operates within one hundred feet of the entrances to medical facilities and within eight feet of another person, "Plaintiff's [sic] message can still reach its intended audience." App. at 14a.

Petitioners had argued that C.R.S. § 18-9-122(3) is unconstitutionally overbroad. The trial court rejected that argument. The court considered the question of overbreadth according to the standard formulated in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). App. at 15a. The trial court reasoned

> for the Court to invalidate the statute there must be a substantial overreach of the statute. '[P]articularly where conduct and *or* [sic] *merely speech* is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' The statute must be so sweeping in its scope as to deter both protected and unprotected speech. The overbreadth doctrine has been

> applied to certain statute [sic] that prohibit certain types of unprotected speech, but may also apply to protected speech. This is applied to ensure that the statute does not censure protected speech.

App. at 15a (citations omitted; emphasis added).[4]

Although C.R.S. § 18-9-122(3) prohibits any person from "knowlingly approach[ing] another person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," the trial court held that "the statute does not prohibit speech." App. at 15a.

Petitioners argued that C.R.S. § 18-9-122(3) was unconstitutionally vague. The trial court held that the statute "uses common ordinary terms[,]" terms with which "people of ordinary intelligence would be familiar." App. at 16a.

Petitioners alleged that C.R.S. § 18-9-122(3) constituted an

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4. The District Court plainly misread and misunderstood this Court's explanation of the overbreadth doctrine. This fact is evident from its *mis*quotation of *Broadrick v. Oklahoma*. In *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), this Court addressed the difference between regulations that target *conduct* (while having some indirect effect on expression) and regulations that target *expression*. Enactments of the former type are reviewed under this Court's substantial overbreadth analysis. Of statutes that affect or restrict conduct, this Court actually said, "particularly where conduct and *not merely speech* is involved, we believe that the overbreadth of a statute must not only be real, but subtantial as well, judged in relation to the statute's plainly legitimate sweep." (Emphasis added). The District Court, both in its misquotation and its treatment of Plaintiffs' fundamental rights of expression, purported to subject C.R.S. § 18-9-122(3) to substantial overbreadth analysis, because Petitioners' conduct constituted, "merely speech." That approach puts the First Amendment on its head.

unconstitutional system of prior restraints on protected expression. The trial court disagreed. The court reasoned,

> Prior restraints deal with situations where the legislature or other government entities attempt to restrain or forbid certain communications in advance of the time in which they are to occur.

App. at 17a. Even though C.R.S. § 18-9-122(3) prohibits the distribution of leaflets, the display of signs, and oral protests, counseling or education, within eight feet of another person and one hundred feet of the entrance to a medical facility, and subjects the right to engage in these activities to the requirement that the speaker obtain "consent," the trial court concluded, "[t]his statute requires no license or permit scheme prior to speaking. It does not forbid the Plaintiff's [sic] activities." App. at 17a.

Having rejected every federal constitutional law argument made by Petitioners, the trial court granted the Respondents' summary judgment motion and entered judgment for Respondents.

2. The Colorado Court of Appeals' treatment of the federal questions

Petitioners appealed to the Colorado Court of Appeals. In a decision dated July 13, 1995, the Court of Appeals affirmed. App. at 1a-9a.

Taking up the issues presented, the appeals court first stated, "[t]he principal issue in this appeal is whether § 18-9-122(3), C.R.S. (1994 Cum. Supp.) violates the right to free speech contained in the First Amendment to the United States Constitution." App. at 2a. As in the trial court,

Petitioners relied on principles of federal constitutional and civil rights law, reiterating the substantial constitutional defects that they had identified in their Verified Complaint and in legal arguments in the trial court.

The appeals court concluded that C.R.S. § 18-9-122(3) is a content-neutral regulation of speech. App. at 5a-6a. To buttress its determination, the appeals court invoked this Court's decision in *Madsen v. Women's Health Center*, 512 U.S. ___, 114 S. Ct. 2516 (1994), "as instructive . . . ." App. at 6a. The appeals court reasoned that because C.R.S. § 18-9-122(3) did "not address only the speech of anti-abortion protestors," App. at 6a, and "would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant[,]" *id.*, the statute "is content-neutral . . . ." App. at 6a.

Having concluded that C.R.S. § 18-9-122(3) was content-neutral, the appeals court considered whether C.R.S. § 18-9-122(3) passed muster as a "reasonable restriction[] on the time, place, or manner of speech," including whether C.R.S. § 18-9-122(3) was "'narrowly tailored,'" and left open "'ample alternative channels' for communication . . . ." App. at 6a-7a. The appeals court found that C.R.S. § 18-9-122(3) was "narrowly tailored," that is, "reasonably necessary to serve a significant government interest." App. at 7a. The interest identified by the court was the State's interest in ensuring "safety and unobstructed access for patients and staff entering and departing from health care facilities." App. at 7a. Further, the appeals court reasoned that ample alternative channels of communication remained open because "posters and signs may be made visible at eight feet[,]" and because "speech can continue at a distance of eight feet or more."

App. at 7a.

The appeals court rejected Petitioners' argument that C.R.S. § 18-9-122(3) was unconstitutionally vague. The appeals court construed the term "protest" to refer to "written or oral communication advocating a viewpoint on medical treatment and procedures." App. at 8a. The court construed "consent" to mean "oral communication or unmistakable physical conduct manifesting agreement." *Id.* Also, the appeals court construed "counseling and education" as meaning "efforts to present information or guidance to persons entering or leaving a health care facility." *Id.*

Finally, the appeals court rejected Petitioners' argument that C.R.S. § 18-9-122(3) imposed an unconstitutional system of prior restraints on speech. App. at 8a. Petitioners had argued that C.R.S. § 18-9-122(3) created a system of prior restraints because it subjected the rights to freedom of speech, of press, and of assembly, in traditional public forum properties, to the requirement of obtaining advance consent from private persons whom Petitioners approach in public places. Petitioners had argued that the prior restraint scheme was defective because it conveyed unbridled discretion to those empowered to deny the right to free speech, because no time limit was imposed on the decision-making process, and because the system of restraints omitted all of the procedural safeguards necessary to validate an otherwise presumptively unconstitutional scheme. The appeals court rejected Petitioners' prior restraint argument out-of-hand because C.R.S. § 18-9-122(3) did not involve "a governmental or other entity that has authority to permit or not permit certain activities in a public forum." App. at 9a.

The appeals court did not treat two of Petitioners' arguments.

First, Petitioners had argued that, in addition to the danger that C.R.S. § 18-9-122(3) created a content-based restriction on free speech in traditional public forum properties, the restriction on "oral protest" and the requirement of consent ran afoul of the First Amendment's condemnation of viewpoint-based restrictions. Petitioners had argued that C.R.S. § 18-9-122(3) treats certain kinds of oral advocacy differently (subjecting it to the requirement of consent) if it constitutes "protest." Other oral advocacy, Petitioners had argued, such as public speeches defending persons, procedures or policies, are not considered "protest" and could be given voice without permission. The appeals court did not answer Petitioners' argument on this point. Petitioners had also argued that, because the statute imposed a consent requirement but included no standards to govern the decision-making process of private citizens to allow or refuse requests for permission to speak in a traditional public forum, the danger of viewpoint-based denials was real and substantial. The appeals court did not answer Petitioners' argument on that point.

Second, Petitioners had argued that C.R.S. § 18-9-122(3) was unconstitutionally overbroad because it directly targetted the right to freedom of speech and freedom of the press. The appeals court did not answer Petitioners' argument.

Petitioners' request for rehearing was denied. App. at 20a.

Review of a decision of the Colorado Appeals Court by the Supreme Court of Colorado rests in that court's discretion and is sought by the filing of a petition for a writ of certiorari. Petitioners timely filed their petition for a writ of

certiorari in the Colorado Supreme Court. The Colorado Supreme Court denied that petition on February 26, 1996. App. at 19a. The decision of the Colorado Court of Appeals was, therefore, the decision of a state court of last resort in these circumstances.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari presents substantial questions of federal law. Three considerations support the grant of a writ here.

First, the decision below conflicts with the decisions of this Court. This Court struck down a restriction on speech which imposed a requirement of obtaining the consent of private persons for the exercise of that right. *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516 (1994). The Colorado Court of Appeals ignored this Court's holding and upheld the challenged statute with its "requirement of consent." Further, this Court has held that a content-based restriction on speech in a traditional public forum is subject to strict scrutiny. *E.g.*, *Boos v. Barry*, 485 U.S. 312, 321 (1988). But the Colorado Court of Appeals did not subject the challenged statute to strict scrutiny. The appeals court's selection of the more forgiving "reasonable time, place and manner" standard of review led to the erroneous validation of Colorado's speech-restrictive statute. Moreover, the appeals court's refusal to consider the prior restraint issues led it to affirm the constitutionality of a statute that plainly violates the standards this Court has held applicable to any system of prior restraints on free expression in public places.

Second, the judgment below conflicts with a decision of the United States Court of Appeals for the Eighth Circuit striking down a similar provision of Nebraska law, which restricted free expression in circumstances where consent to speak was withheld or denied. *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). The judgment below also conflicts with a decision of the North Dakota Supreme Court striking down an injunctive ban on speaking to, or handing a leaflet to, staff and patients of a clinic if they indicate that they do not wish to be spoken to or given a leaflet. *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 411 (N.D. 1992).

Third, this Court should grant this petition so that it may resolve the dubious constitutionality of "consent to speak" requirements that operate in traditional public forum properties to restrict paradigm free speech and free press activities. The rise of this heretofore unimaginable burdening of protected expression threatens the enjoyment and longevity of a liberty envied around the globe. This Court has the opportunity in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065,[5] to affirm *Madsen*'s rejection of *injunctive* schemes that deputize private citizens to act as censors in the public forum. This Petition affords this Court the opportunity to dispose of *legislative* schemes that deputize such pernicious, private anti-speech posses.

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5. The Questions Presented in this Petition raise issues similar to those presented in a Petition recently granted by this Court. *See Pro-Choice Network of Western New York v. Project Rescue-Western New York*, 67 F.3d 377 (2d Cir. 1995) (*en banc*), *cert. granted sub nom. Schenck v. Pro-Choice Network of Western New York*, 64 U.S.L.W. 3623 (U.S. Mar. 15, 1996) (No. 95-1065).

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Decision Below Conflicts with this Court's Decision in *Madsen v. Women's Health Center, Inc.*

1. The Consent Requirement

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516 (1994), this Court struck down a substantially similar injunctive restriction on speech outside a Florida abortion business. The *Madsen* injunction ordered protestors to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 114 S. Ct. at 2529.

The bubble zone created by the trial court and rejected by this Court in *Madsen* was overbroad: "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* (emphasis in original). Unless such restrictions are limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such "provision[s] cannot stand." *Id.*

In the trial court and in the Colorado Court of Appeals, Petitioners had argued that, like the injunctive "bubble zone" in *Madsen*, C.R.S. § 18-9-122(3) was not limited to proscribable speech but instead restricted peaceful, nonthreatening "oral protest," "education," "counseling," sign displays and leafletting. Petitioners argued further that

C.R.S. § 18-9-122(3) does not target precisely the evil it seeks to remedy; the statute regulates *all* attempts to communicate with *any* person in those public places within the scope of the statute. The statute does not regulate *only* contact between speakers and the patients and the employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100 feet of the entrance door to a medical facility, is given the power to control whether others may speak, leaflet, or display signs. Petitioners relied on this Court's decision in *Madsen* below, but the appeals court did not find *Madsen*'s disposal of the injunctive consent to speak requirement dispositive. App. at 6a.

In *Madsen*, this Court held, "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" 114 S. Ct. at 2529 (citation omitted). In words that plainly disposed of such motile personal "bubble zone" restrictions on speech, this Court declared: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.*

The Colorado Court of Appeals, however, did not find any constitutional infirmity in C.R.S. § 18-9-122(3), even though it "burdens more speech than is necessary to prevent intimidation and to ensure access" to medical facilities in Colorado. The decision of the Colorado Court of Appeals directly conflicts with the holding of this Court in *Madsen* rejecting the creation and enforcement of a motile personal "bubble zone" operating to restrict speech in a traditional public forum.

2. Overbreadth

Implicitly, in *Madsen*, this Court struck down the injunctive "bubble zone" because of its overbreadth. This Court said that the injunctive zone was unconstitutional because it restricted "*all* uninvited approaches . . . regardless of how peaceful the contact may be," 114 S. Ct. at 2529, and it "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* The Colorado Court of Appeals, however, found that C.R.S. § 18-9-122(3) was not overbroad, even though it had the benefit of this Court's reasoning in *Madsen* and even though the speech-restrictive zones created by C.R.S. § 18-9-122(3) are functionally similar to the injunctive zone struck down in *Madsen*.

B. The Decision Below Conflicts with this Court's Decisions Regarding the Standard of Review for Content-based Restrictions on Speech.

This Court has held that content-based legislative restrictions on speech in traditional public fora are subject to the strictest scrutiny. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516-17 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440, 2446 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-85 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115-18 (1991); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1987); *Carey v. Brown*, 447 U.S. 455, 460-63 (1980). Such enactments are content-based when they embody direct restrictions on the content of speech or when

they are crafted to allow restrictions on speech to be levied because of audience reactions to speech.

Petitioners argued below that the appropriate standard of review to be applied to C.R.S. § 18-9-122(3) was the strict scrutiny this Court has applied routinely in cases of content-based governmental regulations of speech. Petitioners' argument reflects their textual reading of C.R.S. § 18-9-122(3). The statute distinguishes and burdens certain classes of oral utterance (restricting oral protest, oral education, and oral counseling, and leaving unaffected other oral utterances outside of these classes of communication). In the first instance, the question of whether consent will be required in order to make utterance, the content of the contemplated communication must be considered. If the words are not protest, education, or counseling, no consent is needed. C.R.S. § 18-9-122(3) clearly targets only speech and expressive conduct, and its restrictions are plainly hinged on the content of speech.

The Colorado Court of Appeals rejected both Petitioners' claim that C.R.S. § 18-9-122(3) is content-based and Petitioners' argument that the strict scrutiny standard was the applicable lens for review of the statute. App. at 5a-6a. Instead, the court below analyzed C.R.S. § 18-9-122(3) under the more lenient standard of review for content-neutral regulations of time, place, or manner of expression. App. at 6a-7a.

The choice of standards by the Colorado Court of Appeals and the trial court directly conflict with this Court's decisions in, *inter alia*, *Rosenberger*, *Capitol Square Review and Advisory Board*, *R.A.V.*, *Forsyth County, Ga.*, *Simon &*

Schuster, Inc., *Eichman*, *Boos*, *Texas v. Johnson*, and *Carey*.

C. The Decision Below Conflicts with this Court's Decisions on Prior Restraints of Speech.

Petitioners argued below that the statutory obligation to obtain permission from other citizens in public places before being permitted to display a sign, pass a leaflet, or engage in oral protest, education or counseling, was a prior restraint on free expression. Petitioners argued that, as a prior restraint, C.R.S. § 18-9-122(3) failed constitutional scrutiny because it conveyed unbridled discretion to those from whom a speaker was required to obtain consent to speak, because it imposed no time limits on the decision-maker, and because none of the familiar, constitutional safeguards required by the Constitution in a system of prior restraint are contained in C.R.S. § 18-9-122(3).

1. Unbridled discretion

The Colorado Court of Appeals simply ignored the general rule, observed in this Court, that "speakers need not obtain a license to speak." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988). Regarding prior restraints, this Court has said,

> a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51

(1969).[6]

The right to freedom of speech is so important, this Court has said, that

> a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.

Id. at 151.

Petitioners urged the courts below to declare C.R.S. § 18-9-122(3) unconstitutional on the basis of its complete lack of standards to guide those empowered by the statute to grant or withhold permission to speak in public. Nothing in the Colorado Bubble Zone Statute compels the public to grant consent when speech is unobstructive or nonthreatening. No provision of the law prevents the public from withholding consent to speak based on the content or viewpoint of the proposed communication. The spectre of such censorship inevitably induces *self*-censorship in speakers who seek to communicate in traditional public forum properties. *Lakewood*, 486 U.S. at 757.

The court of appeals and the trial court rejected Petitioners' argument regarding the unbridled discretion conveyed under

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6. The problem of unbridled discretion in a scheme of prior restraints has been unambiguously expounded in an extended line of this Court's decisions. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth*; *Secretary of State of Md. v. Jos. H. Munson Co.*, 467 U.S. 947 (1984).

the statute. The lower courts concluded that because the permission required by the statute had to be obtained from private parties, rather than government officials, the statute was not a prior restraint on expression. App. at 9a, 17a.

2. No time limits for decision-making

To utter oral protests, educational information or words of counsel, to give away free pamphlets, or to show picket signs, Petitioners must first get permission from private citizens. C.R.S. § 18-9-122(3) does not, however, set any limit on the time within which private citizens must act on requests for permission.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court reiterated the rule that "the failure to place limitations on the time within which a censorship board decisionmaker must make a determination . . . is a species of unbridled discretion." *Id.* at 223 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). In *Riley*, this Court struck down a speech licensing scheme that failed to impose definite time limitations on licensors. The lack of a time limitation was unconstitutional because, under North Carolina's charitable solicitations statute, in those circumstances "delay compel[led] silence." *Riley*, 487 U.S. at 802. Here, as in *Riley*, delay in responding to an application for permission to speak compels silence.

The courts below affirmed the constitutionality of C.R.S. § 18-9-122(3) even though the statute contains no time limitation. App. at 9a, 17a.

3. No procedural safeguards

Petitioners argued below that C.R.S. § 18-9-122(3) was an *unconstitutional* prior restraint because the statute provided none of the procedural safeguards that this Court has identified as essential in a system of prior restraints on speech to avoid facial constitutional invalidation. In *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965), this Court identified three procedural safeguards necessary to "obviate the dangers of a censorship system." 380 U.S. at 58. Those safeguards included burdening the censor with proving that the suppressed film was unprotected, *id.*, requiring the censor to obtain a judicial determination of whether the suppressed film constituted protected expression, *id.*, and limiting the denial of a license to "the shortest fixed period compatible with sound judicial resolution." *Id.* at 59.

None of these safeguards are provided in Colorado's Bubble Zone statute, C.R.S. § 18-9-122(3). The decisions below exalted form over substance; the lower courts rejected Petitioners' prior restraint arguments on the ground that C.R.S. § 18-9-122(3) delegates decision-making authority to *private* censors rather than *government* officers, which *supposedly* differentiated it from prior restraint schemes held unconstitutional in the decisions of this Court. App. at 9a, 17a.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF A FEDERAL CIRCUIT COURT AND A STATE COURT OF LAST RESORT.

A. Conflict with the United States Court of Appeals for the Eighth Circuit

The Colorado Court of Appeals' decision directly conflicts with the decision of the United States Court of Appeals in *United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, the Eighth Circuit affirmed a district court decision holding unconstitutional a Nebraska statute that provided,

> [a] person commits the offense of unlawful picketing if . . . he interferes, or attempts to interfere, with any other person in the exercise of his or her lawful right to work . . . by . . . persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose.

Neb. Rev. Stat. § 28-1317(1)(a) (1985) (quoted at 857 F.2d at 426). The Nebraska statute operated on a presumption that unwelcome words are unprotected words. The Eighth Circuit, relying on this Court's decisions, rebuffed that concept: "[t]hat the speech is unwelcome does not deprive it of protection." 857 F.2d at 432 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Cohen v. California*, 403 U.S. 15 (1971); and, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

Under the stricken Nebraska statute no consent to speak was required before communications were initiated, *see* Neb.

Rev. Stat. § 28-1317(1)(a) (1985). But C.R.S. § 18-9-122(3) does not even contain that extremely minimal limitation: the statute prohibits not only persistence of communication, but also initiation of communications without consent.

The decision of the Colorado Court of Appeals, sustaining the constitutionality of Colorado's Bubble Zone Statute, cannot be reconciled with the judgment of the United States Court of Appeals in *IBP*.[7]

B. Conflict with the Supreme Court of North Dakota

The decision of the Colorado Court of Appeals directly conflicts with the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 411 (N.D. 1992).

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7. The decision below — affirming the constitutionality of a statute that "makes a crime out of what under the Constitution cannot be a crime" and that is "aimed directly at activity protected by the Constitution," *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) — is also inconsistent with, if not in direct conflict with, the decision of the United States Court of Appeals for the Fourth Circuit in *N.O.W. v. O.R.*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd in part on other grounds sub nom. Bray v. Alexandria Women's Health Center*, 506 U.S. 263 (1993). In *N.O.W.*, the Fourth Circuit *affirmed* a district court's order refusing to "broaden the scope" of an injunction

> to include activities that tend to 'intimidate, harass or disturb patients or potential patients' because to do so would risk enjoining activities clearly protected by the First Amendment. In addition to the actions enjoined by the district court, the members of Operation Rescue also sought, through verbal means, to persuade women not to seek the services of abortion clinics and to 'impress upon members of society' the moral rightness and intensity of their opposition to abortion. . . . The district court was within its discretion in declining to extend the injunction in a manner that would interfere with such expressive activity.

914 F.2d at 586 (citation omitted).

In *Lambs of Christ*, the North Dakota Supreme Court struck down the provision of an injunction that prohibited "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.'" 488 N.W.2d at 407 n.1 (setting out provisions of injunction). Regarding the prohibitions, on speaking and on distributing literature after a person communicates their wish not to receive it, the North Dakota Supreme Court held that "'speaking' to staff and patients cannot be constitutionally enjoined," 488 N.W.2d at 411, and that "distributing literature is protected communicative activity" for which a complete ban would be inappropriate under the First Amendment. *Id.*

In Colorado, however, "speaking" *to anyone* who does not consent to be spoken to subjects a person to criminal prosecution, at least when such "speech" constitutes "oral protest, education or counseling" under the circumstances set forth in C.R.S. § 18-9-122(3). Yet the Colorado Court of Appeals upheld the Colorado Bubble Zone law.

The decision below cannot be reconciled with the decision of the North Dakota Supreme Court in *Lambs of Christ*.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

This Petition invites this Court to consider the constitutionality of a state statute that subjects the rights of free speech, free press and peaceable assembly to a requirement that consent be obtained from members of the

public before the speech can occur.

C.R.S. § 18-9-122(3) directly restricts activities entitled to substantial constitutional protection. C.R.S. § 18-9-122(3), while purporting to serve the State's interest in securing access to medical facilities, does not regulate obstructive activities, trespass, assaults or the use of threatening language. Instead, the statute is crafted in a way that reveals the State's true interest: suppressing free speech. C.R.S. § 18-9-122(3) prohibits leafletting, display of a picket sign displays, and oral protest, counseling and education, without a close fit between such expressive activities and the asserted interest of Colorado in insuring free access to medical facilities.

Colorado has codified a principle—audience veto power—which other communities might well wish to duplicate. For example, in Skokie, Illinois, there can be little doubt that, had the residents of the Village of Skokie been the final arbiters, uniformed neo-Nazis could not have marched down that Village's streets. *Cf. National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). And, in Cummings, Georgia, if those city residents who lined the street to protest against it had been deputized to decide the question, that city would never have played host to the largest civil rights demonstration in the South since the 1960s. *Cf. Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

Colorado is not alone in its use of speech-free "bubble zone" to restrict freedom of speech in the public forum. Since Colorado's enactment of C.R.S. § 18-9-122(3), the City of Phoenix, Arizona, has enacted a similar provision under its city ordinances. *See* Petition for Writ of Certiorari at 3-4,

Sabelko v. City of Phoenix, No. 95-1415 (U.S. filed Mar. 3, 1996). The City of Santa Barbara, California, has also adopted a similar restriction. *See Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D.Cal.), *vacated and remanded*, 70 F.3d 1277 (9th Cir. 1995). These legislative enactments all disregard this Court's direct holding in *Madsen* on the use of such "requirement of consent" provisions.

This Court has granted certiorari in *Schenck v. Pro-Choice Network of Western New York*, 64 U.S.L.W. 3623 (U.S. Mar. 15, 1996) (No. 95-1065). In *Schenck*, the *en banc* Second Circuit upheld a provision in a preliminary injunction that subjected pro-life "sidewalk counselors" to the restriction that, if the person to whom they were speaking indicated that they did not wish to receive the information being offered to them, the counselors must "cease and desist" in their effort to communicate. *See* No. 95-1065, Pet. App. A-13. C.R.S. § 18-9-122(3) goes even further than the injunctive provision in *Schenck*; unless one has first obtained consent to speak, to show a sign, or to pass a leaflet, these paradigmatic forms of expression constitute criminal violations.

To be sure, in communities across the Nation, veterans' organizations will still conduct Fourth of July festivities, department stores will continue unabated in the promotion of Thanksgiving Day Parades, and Hibernians, with occasional judicial interlude, will continue to sponsor St. Patrick's Day events. But if C.R.S. § 18-9-122(3) stands and continues to serve as a model for legislative enshrinement of the audience veto, then the consequence will be incalculable injury to the rights of freedom of speech, freedom of the press, and freedom of assembly. The decision below, accepting and affirming government enforcement of private

citizens' rights to veto expressive activities in public places, is inconsistent with the First and Fourteenth Amendments.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 24, 1996.

APPENDIX

Colorado Court of Appeals July 13, 1995
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor, Defendants-Appellees.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge.
No. 93CV1984.

Division V JUDGMENT AFFIRMED
Opinion by JUDGE RULAND
Sternberg, C.J., and Rothenberg, J., concur

The American Center for Law & Justice, Jay Alan Sekulow, James Matthew Henderson, Sr., Washington, DC; Roger W. Westlund, Thornton, for plaintiffs- appellants.

Gorsuch Kirgis L.L.C., Roger W. Noonan, Maureen Herr Juran, Denver, for defendant-appellee City of Lakewood, Colorado.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Carol D. Angel, Sr. Asst. Atty. Gen., Kathie A. Greenwalt Troudt, Asst. Atty. Gen., Denver, for defendants-appellees Gale A. Norton and State of Colo., Roy Romer, Governor.

Fairfield and Woods, P.C., Howard Holme, Denver; Legal

Action for Reproductive Action, Celeste Lacy Davis, Roger K. Evans, New York City, for amicus curiae Planned Parenthood of the Rocky Mountains.

Joseph N. de Raismes, III, City Atty., Boulder, for amicus curiae City of Boulder.

The principal issue in this appeal is whether s 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the right of free speech contained in the First Amendment to the United States Constitution. Plaintiffs, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., appeal from a summary judgment determining that the statute does not violate the First Amendment. We affirm.

Section 18-9-122, C.R.S. (1994 Cum.Supp.), enacted in 1993, provides:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> ....
>
> (3) No person shall knowingly approach another person

within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

Prior to this statute's adoption, hearings were conducted before the House and Senate Judiciary Committees of the General Assembly. In one of the hearings before the House Committee, testimony was presented concerning the conduct of some antiabortion protesters at various medical clinics directed both at patients and staff. See Tape Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly). This conduct included efforts to block access to the clinics and to intimidate and harass patients and staff in various ways. The committees were also informed, however, that out of 60,000 patients who obtained services at one of the clinics, only seven percent were there to consider abortions. Nevertheless, all patients were subjected to the same treatment by the protesters. See Tape Recording of Testimony before Senate Judiciary Committee concerning H.B. 1209 (March 3, 1993, 59th General Assembly).

The committees also heard testimony that other types of protests such as those made by animal rights activists occur at medical clinics in the United States where the transplant of animal organs is performed or assessed. The witness also indicated that protesters create a particularly difficult situation for persons with physical disabilities who lack the physical capability to move through crowds. See Tape

Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly).

Following passage of the statute, plaintiffs filed this action seeking a declaratory judgment that s 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the First Amendment on its face and that a permanent injunction should enter against enforcement of the statute by defendants, David J. Thomas (as District Attorney), the City of Lakewood, Gale A. Norton (as Attorney General), and the State of Colorado.

In their complaint and affidavits filed relative to the summary judgment, plaintiffs state that they are "sidewalk counselors" who offer abortion-bound women alternatives to that medical procedure. Plaintiffs state that they educate, counsel, persuade, or inform pedestrians and occupants of motor vehicles in areas adjacent to medical clinics about abortion and abortion alternatives.

To assist in this effort, plaintiffs prepare and distribute written material including cards, leaflets, and pamphlets. Plaintiff Hill uses a fetal model in her counseling and displays it to the public. Posters are also used. Plaintiffs claim that it is impossible at times both to remain on the sidewalk and stay at least eight feet away from others in order to continue speaking, displaying signs, or otherwise protesting or counseling.

I

Section 18-9-122(3) incorporates the so-called "bubble" concept designed to allow communication between protesters and others but to separate the protesters by an eight-foot distance. The statute applies to public sidewalks and streets

which are areas protected by the First Amendment. See Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L.Ed.2d 420 (1988); Denver Publishing Co. v. City of Aurora, 896 P.2d 306 (Colo.1995).

Plaintiffs contend that the statute is unconstitutional for a number of reasons. First, they argue that the statute is an improper "content based" regulation which is directed only at them and applies to all forms of written and oral communication. Second, they assert that the statute is overbroad because it infringes upon their right of free speech more than necessary to accomplish the goal of providing access to health care facilities. We are not persuaded by either argument.

Initially, we address whether a presumption of constitutionality applies to s 18-9-122(3). As our supreme court held in Denver Publishing Co. v. City of Aurora, supra, if the statute is deemed to be a "content-neutral" statute, plaintiffs must introduce competent evidence that the regulation in fact burdens the exercise of free speech. The burden then shifts to defendants to demonstrate that the statute withstands application of the appropriate constitutional standard of review.

If, on the other hand, the statute is intended to apply only to plaintiffs because of their beliefs and viewpoint regarding abortion, then Denver Publishing Co. v. Aurora, supra, suggests that there may be a presumption against its constitutionality. Cf. People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo.1985).

The next issue then is whether the statute is content-neutral, that is, whether the statute is directed only

to anti-abortion protesters and their viewpoint.

In Madsen v. Women's Health Center, Inc., 512 U.S. —, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994), the United States Supreme Court addressed the provisions of a mandatory injunction issued by a Florida state court against protesters at medical clinics in this context. We view the analysis of the Court as instructive here.

Like the injunction entered in Madsen, s 18-9-122(3) does not address only the speech of anti-abortion protesters. The statute would impose the same restrictions upon protesters demonstrating in favor of abortion. The law would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant. Accordingly, applying the analysis of Madsen, we conclude that § 18-9-122(3) is content-neutral because the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred. See American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.1995) (upholding constitutionality of the Federal Freedom of Access to Clinics Entrances Act).

Given our determination that the statute is content-neutral, Madsen indicates that the constitutionality of § 18-9-122(3) must be analyzed under the criteria stated in Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989); see also Denver Publishing Co. v. City of Aurora, supra. The Court in Ward confirmed its holding in prior cases that, even on public streets and sidewalks, the government may impose reasonable restrictions on the time, place, or manner of speech. However, those restrictions must be "narrowly tailored," that is, the restrictions must limit free

speech only to the extent reasonably necessary to serve a significant governmental interest. Otherwise, the statute is deemed "overbroad." Finally, it must appear that there are "ample alternative channels" for communication of the information.

We hold that § 18-9-122(3) meets the enumerated constitutional requirements.

First, the statute advances a significant governmental interest, namely, to ensure the safety and unobstructed access for patients and staff entering and departing from health care facilities.

Second, the statute does not burden speech more than is reasonably necessary because plaintiffs may continue to communicate with the patients and staff at a distance of eight feet or more. Indeed, the restriction merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff.

Finally, in addition to oral communication, posters and signs may be made visible at eight feet with the result that reasonable alternatives to face-to- face communication and direct pamphlet handouts are available. Accordingly, we conclude that the trial court did not err in concluding that defendants satisfied their burden to demonstrate that the statute satisfied the applicable constitutional requirements. Further, to the extent that Edwards v. City of Santa Barbara, 883 F.Supp. 1379 (S.D.Cal. No. 94-2243 RG (JRX), March 14, 1995) is inconsistent with the result we reach here, we decline to follow that case.

II

Plaintiffs next contend that § 18-9-122(3) is unconstitutionally vague. Specifically, they argue that a person of common intelligence will not be able to understand what conduct is prohibited in the context of "knowingly approach." They further contend that the terms "consent," "protest," and "counseling and education" fail to meet constitutional requirements for definiteness. We disagree with all of these contentions.

The term "knowingly" is defined in s 18-1-501(6), C.R.S. (1986 Repl.Vol. 8B) of the Criminal Code. A protester acts knowingly if the protester is aware that his or her conduct will cause the protester to be less than eight feet from someone entering or leaving the health care facility without consent. See People v. Krovarz, 697 P.2d 378 (Colo.1985).

Because the remaining terms are not technical in nature, we must apply the common usage of those words. Section 2-4-101, C.R.S. (1980 Repl.Vol. 1B). To the extent that plaintiffs seek to contrast alternative definitions of the words used, we must apply a common definition that is not vague. See Frisby v. Schultz, supra; City of Englewood v. Hammes, 671 P.2d 947 (Colo.1983).

Thus, as pertinent here, "protest" refers to written or oral communication advocating a viewpoint on medical treatment and procedures. See Webster's Third New International Dictionary 1823. "Consent" refers to oral communication or unmistakable physical conduct manifesting agreement. See Webster's Third New International Dictionary 482. "Counseling and education" refers to efforts to present information or guidance to persons entering or leaving a health care facility.

III

Plaintiffs also contend that s 18-9-122(3) constitutes an unconstitutional prior restraint on speech because the consent of a patient is required before a protester may approach within less than eight feet but no time deadline for the patient's consent is provided. Further, they argue that private citizens have unlimited discretion to determine whether consent will or will not be given without having to apply reasonable guidelines. Finally, they complain that there is no judicial review provided in the statute to determine whether the private citizen's discretion has been exercised in a reasonable fashion. There is no merit in these contentions.

Statutes which have been held unconstitutional as a prior restraint on free speech ordinarily involve a governmental or other entity that has authority to permit or not to permit certain activities in a public forum. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). We are not aware of any authority that would extend this doctrine to impose limitations upon the right of a private citizen to determine whether to permit others to confront that individual concerning medical care or treatment.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE ROTHENBERG, concur.

DISTRICT COURT, COUNTY OF JEFFERSON,
STATE OF COLORADO
CASE NUMBER 93 CV 1984, DIVISION II - GFP

ORDER

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Plaintiffs,

-v-

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado:, THE CITY OF LAKEWOOD, COLORADO; GALE A. NORTON, in her official capacity as Attorney General for the State of Colorado; and STATE OF COLORADO, Roy Romer, Governor,

Defendants.

This matter comes before the Court on the Defendant's Motion for Summary Judgement. The Court finds that it has jurisdiction over the parties and subject matter of this action, and being fully advised in the premises has dispensed with a hearing on the motion pursuant to C.R.C.P. Rule 121, Section 1-15.

After reviewing the record, the Defendant's Motion, the Plaintiff's Response and the briefs submitted by the parties, the Court finds Pursuant to Rule 56 C.R.C.P., there are no genuine issues of material fact in dispute and that the issues

presented are issues of law.

The Plaintiff's challenge C.R.S. Section 18-9-122 as (1) a violation of freedom of speech under the United States Constitution; (2) a violation of the freedom of press under the United States Constitution; (3) a violation of right of peaceable assembly under the United States Constitution; (4) a violation of the due process clause of the United States Constitution; (5) a violation of the equal protection clause of the United States Constitution; and violative of applicable provisions of the Colorado State Constitution.

"[al statute is presumed constitutional... and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Heller v. Doe, 113 S.Ct 2637, 2643 (1993), See also Parrish v. Lamm, 758 P.2d 1356, 1364 (Colo. 1988).

The Court finds that C.R.S. Section 18-9-122 has not been applied to the Plaintiffs. There is no showing by the Plaintiffs that any of them have been arrested, charged, cited. detained or referred for prosecution for violating any part of C.R.S. Section 18-9-122. See admissions of all Plaintiffs.

Therefore the Plaintiffs have only presented a facial challenge to the statute. Where a statute has not been enforced, the challenge is identified as facial. See High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984). Therefore, the Court must examine on its face to determine whether C.R.S. Section 18-9-122 can be possibility construed as constitutional and avoid strained interpretations. People v. Smith, 862 P.2d 939 (Colo. 1993).

It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment. The

issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed by the Constitution.

FREEDOM OF SPEECH

The Plaintiffs engage in "sidewalk counseling." This activity consists of efforts to educate counsel, persuade or inform persons about abortion and alternatives to abortion. This is accomplished through oral expression, protest, displays, signs and leafletting. See affidavits of all Plaintiffs. There is no question that the Plaintiffs conduct implicates First Amendment rights.

However, the First Amendment does not guarantee the right to communicate one's view's at all times and places or in any manner that may be desired." Heffron v. ISKCON, 452 U.S. 640 (1981).

The Plaintiffs engage in these activities on the public streets and public sidewalks. Many times these are located within 100 feet of the entrances to medical facilities. The statute clearly applies to these locations.

The public sidewalks and streets, including the ones that the statute would apply, constitute "quintessential" public forum for First Amendment purposes. See Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

However, the state may subject such expression whether oral or written or symbolized, by conduct to reasonable time, place, and manner restrictions. These regulations will be found reasonable where they "are content-neutral, are narrowly tailored to serve a significant government interest,

and leave open ample alternative channels of communications." Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

A. CONTENT NEUTRAL

The Supreme Court states that "the principal inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 785 (1989).

The Plaintiffs argue that one may be prosecuted under the statute if negative statements are said to people in the vicinity because the statute uses the word "protest." They argue that the statute would not apply to positive statements and therefore positive statements would be permissible. However, the statute applies not only to oral protest but to "education" and "counseling." It appears clear that the statute applies to all viewpoints, rather then only certain viewpoints.

Furthermore, evidence provided by the Defendant's show that the legislative history of the statute makes it clear that the statute applies to all viewpoints rather then certain viewpoints. The state has not favored one view point over another as the Plaintiffs contend.

The Court finds the statute in question applies even-handedly to all speakers and the content of their speech. All persons demonstrating are to comply with the statute. The statute does not govern the subject matter of the message.

B. THE REGULATION MUST BE NARROWLY TAILORED, TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

The statute is designed to protect access to health care facilities. It protects the persons using a health care facility to do so without being threatened, harassed or assaulted by forced confrontations with demonstrators.

The regulation is unrelated to the content of the message. It is related to safeguarding access to health care facilities. This regulation applies equally, not only to pro life or pro choice protestors, but any others engaged in the activities that the statute addresses. Furthermore, even if the regulation has some incidental effect on some speakers and not others the regulation will be deemed neutral. See Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Plaintiffs argue there are other statutes designed to deal with this problem such as assault, trespass, harassment. However, C.R.S. Section 18-9-122 targets the offensive and disturbing conduct taking place outside health care facilities. It address the exact source of evil it seeks to remedy.

The Court finds that the "free zone" is narrowly tailored to address these abuses that impede ingress and egress to medical facilities and the regulation promotes a significant governmental interest that is unrelated to the content of the message.

C. AMPLE ALTERNATIVE MEANS OF COMMUNICATION;

The statutory scheme leaves open ample alternative means of communication. The Plaintiff's message can still reach its intended audience.

The statute only restricts the demonstrators from engaging in their activities within the "free zone " This area constitutes 100 feet of the entrance of a medical facility and within 8 feet

of the listener unless the listener consents. The plaintiffs signs and leaflets may be seen at this distance. Speech may also be heard at this distance.

Although, it may be more difficult for the Plaintiffs to force leaflets in the hands of unwilling recipients and their messages upon audiences unable to escape, the Plaintiff's are able to carry on their activities provided they do so outside the "free zone."

OVERBREADTH CHALLENGE

In order for the Court to invalidate the statute there must be a substantial overreach of the statute. "[P]articularly where conduct and or merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The statute must be so sweeping in its scope as to deter both protected and unprotected speech. The overbreadth doctrine has bin applied to certain statute that prohibit certain types of unprotected speech, but may also apply to protected speech. This is applied to ensure that the statute does not censure protected speech. Hoffman Estates, 455 U.S. at 594. It is not for the Court to determine how creative the challenging party must be in conceiving situations where the language of the statute might be applied to protected speech.

In this case the statute does not prohibit speech. The statute only imposes reasonable time, place and manner restraints on the First Amendment activity. The statute does provide objective standards and guidelines for permitting or

denying the display of signs, the distribution of literature and/or speaking. All these activities may be engaged in as long as the speakers remain outside the "free zone."

The Court believes the statute will do little to deter protected speech. The Plaintiffs state in their affidavits that they will continue with their protected First Amendment activities. See Affidavits of Plaintiffs.

VAGUENESS CHALLENGE

The law must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104 (1972). In addition the law must provide standards for applying the law. Id. at 109.

The words of the statute are given their commonly accepted and understood meaning. East Lakewood San. Dist. v. District Court, 842 P.2d 233, 235 (Colo. 1992).

The statue uses common ordinary terms. The statute speaks in terms of "oral protest," "counseling," and "education." These are everyday terms in which people of ordinary intelligence would be familiar. The statute also provides exact measurements in which these activities may not take place. This area is known as the "free zone." This zone constitutes the area within 8 feet of a person and the area within 100 feet of a medical care facility.

The Court finds that the statute uses terms that fairly and accurately describe conduct forbidden within the "free zone."

The Court finds the statute gives warning of the prohibited conduct. That the Plaintiffs know how to carry out their activities within the proscribed limits of the statute and know

what is expected of them when they are "sidewalk counseling."

PRIOR RESTRAINTS

The Plaintiffs argue that C.R.S. Section 18-9-122(3), imposes a requirement of prior permission before speaking. They claim that under this regulation the private citizens of the state or at least all private citizens in the vicinity of a health care facility are somehow deputized and transformed into agents of the State. And therefore, these private citizens have the power to prohibit the Plaintiffs from engaging in their activities if these citizens do not consent. The Court finds the Plaintiffs argument unpersuasive.

Prior restraints deal with situations where the legislature or other government entities attempt to restrain or forbid certain communications in advance of the time in which they are to occur. This is usually accomplished through licensing or permit schemes.

All prior restraints have one thing in common; they give "public officials the power to deny use of a forum in advance of actual expression." Southeast Promotions v. Conrad, 420 U.S. 546 (1975).

This statute requires no license or permit scheme prior to speaking. It does not forbid the Plaintiffs activities. Therefore, the prior restraint doctrine has no applicability to this statute.

CONCLUSION

The Court addressed all issues set forth in the motions for Summary Judgment and therefore by direct reference or comments made herein disposes of all issues raised in the

complaint.

It is therefore ordered that the motion for Summary Judgment of the Defendant's be granted, that C.R.S. Section 18-9-122 as amended is facially constitutional, and that the complaint be, and the same is hereby dismissed.

DONE AND SIGNED IN OPEN COURT this 22nd day of April, 1994.

BY THE COURT:

/s/
Gaspar F. Perricone
District Judge

[certificate of mailing omitted]

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC593
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

ORDER OF COURT

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado ; and THE STATE OF COLORADO, ROY ROMER, Governor,

Respondents

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 26, 1996.

[service list omitted] [seal omitted]

THE COURT OF APPEALS OF
THE STATE OF COLORADO

Case Number 94CA0856

ORDER

LEILA J. HILL ET AL V DAVID J. THOMAS ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including September 18th 1995, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain if effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.
Sternberg, C.J.
Rothenberg, J.

DATED: August 17, 1995

[service stamp omitted] [seal omitted]